

July 14, 2005

Margaret Griffin
1515 Shasta Drive, #1401
Davis, CA 95616

**Re: Your Request for Informal Assistance
Our File No. I-05-114**

Dear Ms. Griffin:

This letter is in response to your request for informal assistance regarding the post-governmental employment provisions of the Political Reform Act (the "Act").¹ As your request seeks general assistance relating to the post-governmental employment provisions of the Act, and does not provide specific information about particular proceedings, we are treating your request as one for informal assistance.² This letter is solely based on the facts presented to us in your request. The Commission does not act as a finder of fact when issuing advice or informal assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and all of the material facts have been provided.

QUESTION

What potential restrictions are placed on you by the Act as you consider retiring from the California Department of Aging and accepting employment as a paid consultant for the MSSP Site Association?

CONCLUSION

The potential restrictions placed on you by the Act include the ban against influencing prospective employment, the permanent ban against switching sides, and the one-year ban, all of which are discussed in detail below.

¹ The Act is contained in Government Code sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in sections 18109 through 18997 of title 2 of the California Code of Regulations. All regulatory references are to title 2, division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Regulation 18329, subd. (c), copy enclosed.)

FACTS

You are a state employee about to retire from the California Department of Aging (the “CDA”). While employed by the CDA, you have served as an associate governmental program analyst (an “AGPA”) and as a health program specialist (an “HPS I”), working with the Multipurpose Senior Services Program (the “MSSP”), a Medi-Cal waiver program.

The MSSP provides case management services to frail, elderly Medi-Cal recipients requiring services and support to be able to move into, or remain in, community-based living arrangements rather than nursing facilities. The CDA oversees the operation of 41 local MSSP sites that deliver services to individual clients. Each MSSP site belongs to the MSSP Site Association (the “MSA”).

As an employee of the CDA, you were designated in the CDA’s conflict of interest code as being a person who makes or participates in making governmental decisions. Your duties included overseeing local site contracts, providing case management training and technical assistance, and participating in developing and writing both the site manual and the federal waiver.

The MSA has expressed an interest in employing you as a consultant upon your retirement from the CDA to draw upon your expertise concerning:

1. Case management principles and practices;
2. The policies and procedures in the MSSP site manual;
3. Principles of the federal program waiver.

You would be providing advice and consultation to the MSA directly regarding issues relative to the operation of the MSSP, but you would not be representing the MSA before CDA or any other governmental agency.

ANALYSIS

Ban on Influencing Prospective Employment

The Act’s post-employment restriction immediately relevant to your circumstances is that found at section 87407:

“No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.”

The term “public official” is defined, in part, in section 82048 as “...every member, officer, employee or consultant of a state or local government agency, but does not include judges and court commissioners in the judicial branch of government....” The CDA is a state

administrative agency, as defined in section 87400, subdivision (a), and as both an AGPA and an HSP I for the CDA, you have been and are subject to the post-employment restrictions of the Act.

“A public official is ‘negotiating’ employment when he or she interviews or discusses an offer of employment with an [potential] employer or his or her agent.” (Reg. 18747, subd. (c)(1).) The Commission has construed the scheduling, conduct, and follow-up to an interview as one continuous process falling under the definition of “negotiating” employment. (*Bonner* Advice Letter, No. I-98-287.) However, the mere act of sending a resume or application to a specific entity has not been considered “negotiating.” Similarly, entertaining informal inquiries about your future plans and receiving expressions of general interest in discussing potential employment opportunities at some point in the future is not considered “negotiating.” (Id.) “A public official has an ‘arrangement’ concerning prospective employment when he or she accepts an employer’s offer of employment.” (Reg. 18747, subd. (c)(2).)

You stated that you have “a potential opportunity to consult for” the MSA, and that the MSA “has expressed an interest in” having you do some consulting work for them. Although this description of your contacts with the CDA about future employment is rather non-specific, it appears that you have sufficiently discussed the prospect of your employment by the CDA for those contacts to be considered part of a “negotiation.” If such is the case, you are now prohibited, pursuant to section 87407, from making, participating in the making, or using your official position with the CDA to influence any governmental decisions that impacts the MSA. You should therefore examine each decision you face and ascertain if the MSA is involved in or affected by that decision to determine if you are permitted to participate.

One-Year Ban

If you indeed accept employment as a consultant to the MSA upon leaving state service, you would then be subject to two types of post-governmental employment restrictions under the Act. The first is a one-year ban on making any appearance before your former agency for compensation for the purpose of influencing administrative, legislative, or other specified actions. The second is a permanent ban on advising or representing any person for compensation in any judicial or other proceeding in which you participated while in state service.

The one-year ban applicable to former state employees is set forth in section 87406, subdivision (d). Section 87406, subdivision (d)(1) specifically provides that no designated employee of a state administrative agency:

“... for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or

communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property”³

Under the one-year ban, you may not, as a paid employee of MSA, appear before or communicate with the CDA, if the communication or appearance is made for the purpose of influencing any legislative or administrative action of the CDA, or influencing any discretionary act “involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (§ 87406, subd. (d)(1); Reg. 18746.1, subd. (b)(5).) An appearance or communication “is for the purpose of influencing if it is made for the principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Reg. 18746.2, subd. (a).)⁴

However, not all communications with a former state administrative agency employer are prohibited by the one-year ban. The ban extends only to those communications for the purpose of influencing any legislative or administrative action, or influencing any discretionary act “involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property.” (§ 87406(d)(1); Reg. 18746.1, subd. (b)(5).) An appearance or communication before a former state administrative agency employer, made as part of “services performed to administer, implement, or fulfill the requirements of an existing permit, license, grant, contract, or sale agreement may be excluded from the [one-year] prohibitions . . . provided the services do not involve the issuance, amendment, awarding, or revocation of any of these actions or proceedings.” (Reg. 18746.1, subd. (b)(5)(A); *Quiring* Advice Letter, No. A-03-272; *Hanan* Advice Letter, No. I-00-209.)

You have advised us that you were a designated employee of the CDA, and therefore potentially subject to the one-year ban. Having said that, you also advised us that the consulting work you are thinking about performing for the MSA would not involve representing the MSA before the CDA or any other governmental agency. If that remains true throughout the one-year period after leaving state service, then the one-year ban would not affect you. However, if your duties should change during that period to include representing the MSA in communications with the CDA, then you must consider the restrictions that would be placed on you by the one-year ban.

³ “Administrative action” is defined as “the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding” (§ 82002, subd. (a).)

⁴ The Commission has advised that a former agency official may draft communications or proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321.)

Permanent Ban on Switching Sides

Sections 87401 and 87402 set forth the permanent ban that prohibits former state administrative officials,⁵ who participated in a judicial, quasi-judicial, or other proceeding while employed by a state agency, from being paid to represent or assist in representing another person regarding that same proceeding. Section 87401 specifically provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.”

Section 87402 provides:

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.”

Regulation 18741.1 further clarifies that:

“(a) The prohibitions of Government Code Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

(1) The official has permanently left state service or is on a leave of absence.

(2) The official is compensated, or promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. However, a payment made for necessary travel,

⁵ “State administrative official” is defined in section 87400, subdivision (b) as “every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.”

meals, and accommodations received directly in connection with voluntary services are not prohibited or limited by this section.

(3) The official makes an appearance or communication before any officer or employee of any state administrative agency for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in 2 Cal. Code Regs. Section 18202, subdivisions (a)(1)-(a)(7).

(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in 2 Cal. Code Regs. Sections 18702.1-18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. Any supervisor is deemed to have participated in any proceeding which was "pending before," as defined in 2 Cal. Code Regs. Section 18438.2, subdivision (b), the official's agency and which was under his or her supervisory authority.

(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated."

As stated above, the permanent ban is a lifetime ban and applies to any judicial, quasi-judicial, or other proceeding in which you participated while a state administrative official at the CDA or another state agency. "Judicial, quasi-judicial or other proceeding" means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency" (§ 87400, subd. (c).) It includes any proceeding in which a state administrative official has participated, but is not concluded before the official leaves state employment.

To apply the permanent ban to your situation, you would need to identify the proceedings in which you participated while employed by the state. "Participated" is defined at section 87400, subdivision (d) as follows:

"Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties." (See also Reg. 18741.1.)

You stated that as an AGPA and an HSP I for the CDA you oversaw local MSSP site contracts, provided case management training and technical assistance, and participated in developing and writing both the site manual and the federal waiver. To the extent that in the

course of performing your duties with the CDA you participated in any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, or other particular matter involving a specific party or parties in any court or state administrative agency, you would be prohibited from working for the MSA on that same matter. However, the permanent ban only applies to specific proceedings that you participated in while at the CDA, and not to any new proceedings. You should examine the specific facts of each matter to determine whether the permanent ban applies.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Steven Benito Russo
Senior Commission Counsel
Legal Division

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